Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-97

ALLIED CHEMICAL CORPORATION
Petitioner

v.

ANTHONY WHITE and HENRY CLARK, SR.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Cases:

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Fay v. Noia, 372 U.S. 391 (1963) 3

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United States v. General Motors Corporation, 323 U.S. 373 (1945) 2

Miscellaneous:

H.R.Rep.No. 92-238, p. 19 (1971), U.S. Code Cong. & Admin. News, 1972, pp. 2137, 2154 3

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Respondents raised two points in their Brief in Opposition to which we reply herein. They suggest that this case is not ripe for certiorari because the Court of Appeals did not "lay down any guidelines as to the legal standards to be followed" on remand (Opp. p. 3). They further, and inconsistently, argue that the Court of Appeals set down the proper guidelines, even though these guidelines are the strict standards established for waiver of constitutional rights rather than assert an agreement not to sue as part of a Congressionally encouraged conciliation agreement. Both arguments are unfounded.*

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* Respondents also argued (Opp. p. 2) that the decision below is a proper application of the holding of the Court in **Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974)**. This contention is answered in our petition (pp. 7-9).

1. **Ripeness.**

Respondents' argument that the Court of Appeals did not establish "any guidelines as to the applicable legal standards to be followed" on remand misconstrues the decision of the Court of Appeals. Indeed, the Court of Appeals did lay down a standard. It has required a hearing "to determine whether in fact [Respondents] comprehended the rights they were relinquishing." (Pet. App. A-7) The Court of Appeals thus has adopted a standard related to each individual's "comprehension in fact". This standard, applied to a complex agreement between an employer, a union, a government agency and a multitude of employees is, we submit, unworkable. The effect of this holding, as we pointed out in our petition (pp. 5-11), is to require factual hearings on the mere allegations of any signatory that he did not fully understand what he was giving up. Conciliation agreements thus become an invitation to litigation whenever the shoe pinches, rather than an end to litigation. In any event, the standard is ripe for this Court's review.

The cases cited by Respondents on the issue of ripeness are not in point. None of them deals with the situation in which a remand for a hearing may jeopardize a congressionally established plan for the settlement of disputes or a situation in which the standard for remand itself is at issue. A better guide for the Court is *United States v. General Motors Corporation*, 323 U.S. 373, 377 (1945) in which the Court issued a writ of certiorari to correct the Court of Appeals' interpretation of law before permitting remand to the district court for factual findings. See also *Austin Independent School District v. United States*, 429 U.S. 990 (1976), in which the Court of Appeals had ordered the remand to the district court for the development of a comprehensive desegregation plan. This Court granted certiorari, summarily vacating the judgment, and remanded the case for further consideration in light of a subsequent decision.†

2. **Standard for Assent to Conciliation Agreement.**

Respondents, like the Court of Appeals, assumed that the proper standard for reviewing assent to a Title VII conciliation agreement is the same as the standards developed for reviewing waivers of constitutional rights. To the contrary, the application of such strict constitutional standards seems particularly inapposite to assent to a conciliation agreement, since any waiver is of a statutory procedural right, not a constitutional right, and is part of the congressional policy of encouraging settlement through conciliation.

The cases cited by Respondents all deal with the waiver of constitutional rights to a fair criminal trial. *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Gardner v. Florida*, 430 U.S. 349 (1977), are both concerned with the waiver of the right to counsel. *Barber v. Wingo*, 407 U.S. 514 (1972) (cited incorrectly as 412 U.S. 218) concerned waiver of the right to a speedy trial and *Fay v. Noia*, 372 U.S. 391 (1963) waiver of the right to appeal and in which one of the issues would be voluntariness of a confession.

This Court has applied lesser standard than that adopted by the Court of Appeals (comprehension in fact) even as to waivers of certain constitutional rights. Thus in *Schenchloth*

† Respondents' brief further implies (Opp. p. 4) that certiorari is premature at least as to the lack of a right to sue notice because "the waiver covers only rights sueable under Title VII" as distinguished from those under 42 U.S.C. § 1981. This is factually incorrect. The release of the conciliation agreement provides:

> "The Charging Parties hereby waive, release, and covenant not to sue Respondent Company and/or Respondent Union with respect to any matters which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission . . ." [Pet. App. C-8]

". . . [T]he remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981,...", H.R.Rep.No. 92-238, p. 19 (1971), U.S. Code Cong. & Admin. News, 1972, pp. 2137, 2154.

v. Bustamonte, 412 U.S. 218 (1973), this Court stated (at 237):

> Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the constitution guarantees to a criminal defendant in order to preserve a fair trial. [footnote omitted]

The Court found a "vast difference" (*id.* at 241) between the rights "that protect a fair criminal tral and rights guaranteed under the Fourth Amendment." The Court thus rejected the "knowing and intelligent waiver" test as the test for waivers of Fourth Amendment rights and considered instead whether there had been "inheritently coercive tactics" (*id.* at 247). Here there is not even any suggestion of coercive tactics against Respondents.

* * *

The standard for withdrawing from assent to a Title VII conciliation agreement should be determined by this Court. We respectfully submit that the petition for writ of certiorari should be granted herein.

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PROOF OF SERVICE

I, Victor A. Sachse, III, attorney for Allied Chemical Corporation, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 30th day of September, 1977, I served the foregoing reply brief, on Anthony White and Henry Clark, Sr., respondents in connection with this application for a writ of certiorari, by mailing three copies thereof to their counsel of record, Donald Juneau, Esq., Suite 501, 910 17th Street, N.W., Washington, D.C. 20006, and on Local 216, International Union of Operating Engineers, AFL-CIO, by mailing three copies thereof to its counsel of record, James D. Thomas, II, Esq., 429 Government Street, Baton Rouge, Louisiana 70802.

s/ Victor A. Sachse, III

VICTOR A. SACHSE, III